SUPREME COURT OF THE UNITED STATES.

Nos. 146 and 173.—October Term, 1927.

146	Henry Wilson, et al., Petitioners, *vs.* Pacific Mail Steamship Company, Steamship "Newport", Her Engines, etc.; J. McKinnon, Master, etc.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.
173	Pacific Mail Steamship Company, Claimant of the Steamship "Newport", Her Engines, etc., and J. McKinnon, Master of said vessel, Petitioners, *vs.* Henry Wilson, et al.	

[April 9, 1928.]

Mr. Justice McReynolds delivered the opinion of the Court.

Twelve miles off the shore of California, 9:53 A. M., November 29, 1922, sky clear, sea smooth and uninterrupted, the *Newport*, an iron passenger steamer 337 feet long—2643 tons—drove her prow amidships into the port side of the *Svea*, a wooden lumber steam schooner of 618 tons and 170 feet long. Both vessels were seriously injured. The owners of the *Svea* libelled the *Newport*, her owners and master in the District Court, Southern District of California. They charged that the collision resulted from the sole fault of the *Newport* and her navigators and asked for full damages. A cross libel admitted fault, but claimed that the other vessel contributed and prayed for application of the half-damage rule.

The trial court concluded that the collision resulted solely from the gross negligence and plain fault of the *Newport* and granted a decree against her and the master—McKinnon—for all established damages. The Circuit Court of Appeals held there was mutual fault, divided the damages, and definitely declared that under the approved rule the master was responsible for the negligence of subordinates without regard to his personal fault.

Counsel for cross-petitioner McKinnon earnestly maintain that considering present conditions of navigation the master, when free from fault, ought not to be held liable for the action of others. But it is unnecessary now to discuss that question.

Here the record fails to disclose that the master met the exacting duties voluntarily assumed. An amazing casualty occurred while he commanded and presumably, at least, he participated in the admitted fault of his ship. Certainly, nothing short of very clear evidence of intelligent care could possibly absolve him.

The day was fine; the horizon ten miles away. The *Newport* was proceeding eastward at nine knots with the *Svea* off her starboard side steaming northward at eight knots. They were approaching each other upon crossing courses and in full view for more than half an hour. Twenty minutes before the collision Captain McKinnon quit the bridge of the *Newport*, leaving the third officer in charge. Of this subordinate he testified: "This young man was just keeping his first watch on ship; he just shipped the day before, and was making his first voyage." When upon the witness stand the Captain failed to show what, if any, directions he gave or that he took reasonable precaution to insure proper navigation in circumstances of obvious danger. He gave no excuse, nor did he indicate any necessity for leaving the bridge. It is impossible for us to say that he acted prudently.

The International Rules for Navigation at Sea (Act 1890, Ch. 802, 26 Stat. 327, Act 1894, Ch. 83, 28 Stat. 82; U. S. C., Title 33, Secs. 104, 106, 112, 121, p. 1055) direct—

> "Art. 19. When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other.
>
> "Art. 21. Where, by any of these rules, one of two vessels is to keep out of the way the other shall keep her course and speed.
>
> "Note.—When, in consequence of thick weather or other causes, such vessel finds herself so close that collision can not be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert collision.
>
> "Art. 27. In obeying and construing these rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger.

"Art. 29. Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case."

The *Newport* kept her course and speed up to the moment of collision and it is admitted that in so doing she was at fault. But her counsel claim that the *Svea* also was at fault in holding her course and speed and that by acting differently she should have avoided the accident. The evidence does not support that view. Consideration must be given to the circumstances as they appeared at the time; not as they are now known. The *Svea* adhered to the fundamental rule. If in the difficult circumstances forced upon him her navigator, whose qualifications are not questioned, exercised his best judgment in not departing therefrom, the burdened vessel must accept the consequences. Having driven him into a perplexing situation, the *Newport* cannot complain because he failed to make the most judicious choice between the hazards presented.

Without stopping to set out the evidence, it is enough to say that we think there is no clear proof that the *Svea* failed in her duty. She tried in vain by repeated blasts to ascertain the *Newport's* intention. Her master could not possibly know the result of departing from the prescribed rule, and we cannot say that he acted indiscreetly in following it.

Big vessels may not insolently disregard smaller ones; super size gives no right to domineer. The *Newport* was a handy vessel. By porting her helm or reversing her engines two minutes or less before the collision occurred she could have avoided it easily. There was nothing to show that she would not do one of these things until too late for the *Svea's* master to maneuver his vessel into safety.

The applicable doctrine is plainly announced in The Delaware, 161 U. S. 459, 469—

"The cases of The Britannia, 153 U. S. 130, and The Northfield, 154 U. S. 629, must be regarded, however, as settling the law that the preferred steamer will not be held in fault for maintaining her course and speed, so long as it is possible for the other to avoid her by porting, at least in the absence

of some *distinct indication* that she is about to fail in her duty. If the master of the preferred steamer were at liberty to speculate upon the possibility, or even of the probability, of the approaching steamer failing to do her duty and keep out of his way; the certainty that the former will hold his course, upon which the latter has a right to rely, and which it is the very object of the rule to insure, would give place to doubts on the part of the master of the obligated steamer as to whether he would do so or not, and produce a timidity and feebleness of action on the part of both, which would bring about more collisions than it would prevent. Belden *v.* Chase, 150 U. S. 674; The Highgate, 62 L. T. R. 841; S. C. 6 Asp. Mar. Law Cases, 512."

The decree of the Circuit Court of Appeals in 146 is reversed and that of the District Court is affirmed. In 173 the decree of the Circuit Court of Appeals is affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.